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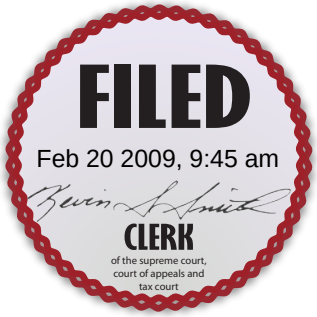

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IN THE
COURT OF APPEALS OF INDIANA

BRIAN SCOTT WADDELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 73A04-0806-CR-367
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE SHELBY SUPERIOR COURT
The Honorable Russell J. Sanders, Judge
Cause No. 73D02-0805-CM-591

February 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Brian Waddell appeals the trial court's denial of his motion to withdraw his guilty plea, which he filed after being convicted and sentenced for committing Intimidation,[1] a class A misdemeanor. Specifically, Waddell argues that the trial court should not have accepted his guilty plea because there was no factual basis supporting it and it was not knowingly and intelligently made. In addition, Waddell argues that there was insufficient evidence to convict him of intimidation.

Appellee-plaintiff State of Indiana cross-appeals, arguing that Waddell may not challenge the factual basis of his guilty plea on a direct appeal. Finding no error, we affirm the judgment of the trial court.

FACTS

The police report that was filed in this case reveals that on May 4, 2008, Leasa Lee and Waddell were living together in a house located in Flat Rock. Around 11:28 p.m., Officer James Lacy was dispatched to the residence after Lee's adult son called the police because Lee and Waddell had been arguing and Waddell had shut the power off in the house. Appellant's App. p. 38.

On May 15, 2008, Waddell was charged with intimidation, a class A misdemeanor, for allegedly saying to Lee, "You are my victim, if I go, you go." Id. at 4. Waddell's initial hearing took place on May 19, 2008, when, as part of a group, he was informed of his constitutional rights. When Waddell was individually before the court, he was informed of the charge against him and its possible penalties. Waddell asked the court if he could "just

[1] Ind. Code §§ 35-45-2-1(a)(1), -1(a)(2).

plead guilty and just get it over with then." Tr. p. 15. The trial court informed Waddell that it was his decision whether or not to plead guilty but that he could not do it at that time because the trial court was "running too late." Id. The trial court admonished Waddell that one possible consequence of pleading guilty could be the revocation of his parole and asked Waddell if he wanted to be brought back over the following day so that he could then think about it some more. Waddell agreed to wait until the next day.

The following day, Waddell and other individuals who were also in custody were brought before the trial court. As part of the group, Waddell was informed of the constitutional rights that he would be waiving by pleading guilty. When Waddell was before the court individually, he was asked if he still wanted to plead guilty. Waddell informed the trial court that he did, and he was asked if he understood that he would be waiving certain constitutional rights by pleading guilty. Waddell responded that he understood, and the trial court advised Waddell as to the penalties that could be imposed and the possibility that his parole would be revoked, which would force him to serve the remainder of his prior sentence consecutively to any sentence imposed by the trial court. Waddell still insisted that he wanted to plead guilty.

The trial court requested that the prosecuting attorney, David Riggins, give the factual basis for the charge. In response, Riggins asked Waddell "did you knowingly or intentionally . . . communicate a threat to Leasa Michelle Lee by making a statement, 'You are my victim. If I go, you go' with the intent that Leasa Michelle Lee engage in conduct against her will or be placed in fear of retaliation for prior lawful conduct?" Id. at 20. Waddell responded

affirmatively and pleaded guilty to intimidation.

In determining an appropriate sentence, the trial court noted that, "[a]ccording to the police report you had drunk something like 30 beers during the day before this happened." Id. at 21. Waddell denied this and stated that he and Lee had gotten into "a little fight," and that he was "just a victim." Id. at 21-22. Waddell then denied making the statement, "You are my victim. If I go, you go," id. at 23, and the trial court rejected his guilty plea and set the matter for trial.

Waddell was given another opportunity to tell his version of events, and he stated that he might have told Lee that "I will smack your ass." Id. at 24. However, after Riggins read the alleged statement again, Waddell stated, "I remember now. That's what I said." Id.

Lee testified, "[h]e really didn't threaten me in any way. We just had a little argument. My son called the cops, I didn't." Id. at 25. Waddell was given another opportunity to speak and stated, "[i]n my eyes I didn't do anything wrong." Id. at 27. The trial court then sentenced Waddell to ninety days in jail.

On May 21, 2008, the trial court received "correspondence" from Waddell requesting a change of plea hearing. Appellant's App. p. 2. On May 30, the trial court held a hearing on this request. At the hearing, the trial court confirmed that Waddell was in fact requesting to withdraw his guilty plea, and advised Waddell that "if you are going to request to set [the guilty plea] aside, you really need to do it by way of filing an appeal." Tr. p. 32. The trial court then advised Waddell of his right to an appeal and appointed appellate counsel. Waddell now appeals.

DISCUSSION AND DECISION

I. Cross-Appeal: Challenge to Direct Appeal

Before proceeding to the merits of Waddell's claims, we first address the State's cross-appeal. The State argues that Waddell may not challenge his conviction following a guilty plea on direct appeal. Generally, a defendant should challenge a guilty plea through a petition for post-conviction relief rather than by a direct appeal. Tumulty v. State, 666 N.E.2d 394, 396 (Ind. 1996). However, Indiana Code section 35-35-1-4 permits a motion to withdraw a guilty plea to be treated like a petition for post-conviction relief under certain circumstances. Specifically, section 35-35-1-4 provides in relevant part:

> (c) After being sentenced following a plea of guilty, . . . the convicted person may not as a matter of right withdraw the plea. However, upon motion of the convicted person, the court shall vacate the judgment and allow the withdrawal whenever the convicted person proves that withdrawal is necessary to correct a manifest injustice. A motion to vacate judgment and withdraw the plea made under this subsection shall be treated by the court as a petition for postconviction relief under the Indiana Rules of Procedure for Postconviction Remedies. For purposes of this section, withdrawal of the plea is necessary to correct a manifest injustice whenever:
>
> ***
>
> (3) the plea was not knowingly and voluntarily made;
>
> ***
>
> (5) the plea and judgment of conviction are void or voidable for any other reason
>
> ***
>
> (e) Upon any motion made under this section, the moving party has the burden of establishing his grounds for relief by a preponderance of the evidence. . . .

In the instant case, Waddell sent the trial court a pro se request to set aside his guilty plea the day after he had been sentenced. Although a copy of this request is not in the record, we note that the chronological case summary indicates that the trial court received the request, and the transcript confirms that a hearing was held on this request. At this hearing, the trial court advised Waddell of his right to an appeal and appointed appellate counsel for Waddell. Therefore, we will treat Waddell's written request to set aside his guilty plea as a motion to withdraw his guilty plea. Furthermore, because Waddell did not file his motion to set aside his guilty plea until after he had been sentenced, we will treat Waddell's motion to withdraw his guilty plea as a petition for post-conviction relief in accordance with Indiana Code section 35-35-1-4.

The petitioner in a post-conviction proceeding bears the burden of establishing ground for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. McCarty, 802 N.E.2d at 962. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the trial court. Id.

II. Guilty Plea

A. Protestation of Innocence and Factual Basis

Waddell argues that the trial court erred by accepting his guilty plea because it was accompanied by a protestation of innocence and lacked a factual basis. Our Supreme Court has cautioned that Indiana courts should closely scrutinize guilty pleas. Ross v. State, 456 N.E.2d 420, 422 (Ind. 1983). Furthermore, when a guilty plea is accompanied by a protestation of innocence and there is no factual basis for guilty plea, the trial court should not accept it. Id. However, a statement of innocence made after the acceptance of a guilty plea does not amount to a protestation of innocence requiring the trial court to set aside the guilty plea. Mayberry v. State, 542 N.E.2d 1359, 1361 (Ind. Ct. App. 1989).

At Waddell's guilty plea and sentencing hearing, Riggins asked Waddell:

> Brian, did you knowingly or intentionally . . . communicate a threat to Leasa Michelle Lee by making a statement, 'You are my victim. If I go, you go' with the intent that Leasa Michelle Lee engage in conduct against her will or be placed in fear of retaliation for prior lawful conduct.

Tr. p. 20. Waddell answered "yes." Id. The trial court then asked Waddell: "How do you plead then to intimidation, a class "A" misdemeanor?" and Waddell answered "guilty." Id.

Nevertheless, Waddell points out that during the sentencing portion of his hearing, Waddell denied stating "You're my victim. If I go, you go." Id. at 23. However, after Riggins read the statement a second time, Waddell stated, "I remember now. That's what I said." Id. at 24.

As the record reveals, Waddell's protestation of innocence was not made until the trial court had already pronounced him guilty and was trying to determine the appropriate sentence. Moreover, Waddell failed to maintain his protestation of innocence throughout his hearing. Instead, Waddell recanted his earlier statement of innocence and twice admitted to the allegations in the State's charging information. Tr. p. 20, 24. Therefore, we cannot say that Waddell's guilty plea was accompanied by a protestation of innocence.

In a related argument, Waddell argues that there was no factual basis supporting his guilty plea. A trial court's determination of a factual basis arrives to us with a presumption of correctness, and we will review it only for an abuse of discretion. Oliver v. State, 843 N.E.2d 581, 588 (Ind. Ct. App. 2006). This court has stated that the State may establish a factual basis for a defendant's guilty plea in several ways:

> (1) by the State's presentation of evidence on the elements of the charged offenses; (2) by the defendant's sworn testimony regarding the events underlying the charges; (3) by the defendant's admission of the truth of the allegations in the information read to the court; or (4) by the defendant's acknowledgement that he understands the nature of the offenses charged and that his plea is an admission of the charges.

Id.

As stated earlier, Waddell pleaded guilty to intimidation after admitting to the allegations contained in the State's information. Although Waddell later denied making the particular statement in the information, he again admitted to making the statement when the allegations were read to him a second time. Thus, we cannot say that there was no factual basis supporting Waddell's guilty plea.

B. Knowing and Intelligent Plea

Waddell asserts that the trial court should have rejected his guilty plea because it was not knowingly and intelligently made. A defendant's decision to plead guilty must be knowing, voluntary[2] and intelligent. Davis v. State, 675 N.E.2d 1097, 1102 (Ind. 1996). A trial court's en masse advertisement of rights is an acceptable procedure so long as the court ensures that each defendant understands his rights and the concept of waiver. Barker v. State, 812 N.E.2d 158, 163 (Ind. Ct. App. 2004). Before accepting a guilty plea, a trial court is statutorily required to determine if the defendant:

> (1) understands the nature of the charge against him;
>
> (2) has been informed that by his plea he waives his rights to:
>
> (A) a public and speedy trial by jury;
> (B) confront and cross-examine the witnesses against him;
> (C) have compulsory process for obtaining witnesses in his favor; and
> (D) require the state to prove his guilt beyond a reasonable doubt at a trial at which the defendant may not be compelled to testify against himself;
>
> (3) has been informed of the maximum possible sentence and minimum sentence for the crime charged and any possible increased sentence by reason of the fact of a prior conviction or convictions, and any possibility of the imposition of consecutive sentences.

Ind. Code § 35-35-1-2(a).

During the guilty plea hearing, the trial court inquired into whether Waddell understood the guilty plea proceedings and the following colloquy took place:

THE COURT: You under the influence of alcohol or drugs today? You have to speak up, sir.

MR. WADDELL: No.

THE COURT: Do you have any other problem that would prevent you from understanding what we're doing today?

MR. WADDELL: No, sir.

THE COURT: How far have you been through school?

MR. WADDELL: GED and trade school.

THE COURT: Do you read and write, sir?

MR. WADDELL: Yes, sir.

THE COURT: Mr. Waddell, just a few moments ago Mr. Calbeck was up here. I advised him of the constitutional rights that he would be waiving when he pled guilty. Were you paying attention as instructed?

MR. WADDELL: Very close attention.

THE COURT: And do you understand those rights?

MR. WADDELL: Yes, sir.

THE COURT: Would you like me to explain any or all of them again for you?

MR. WADDELL: No, sir.

THE COURT: And, again, you understand that you would be waiving those rights by pleading guilty today?

MR. WADDELL: Yes, sir.

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[2] Waddell does not argue that his guilty plea was involuntary.

THE COURT: And I've advised you of your right to be represented by an attorney and the fact that the court would appoint an attorney if you couldn't afford one, is that correct, sir?

MR. WADDELL: Yes, sir.

THE COURT: And I've also advised you of the risks and disadvantages of not having a lawyer?

MR. WADDELL: Yes, sir.

THE COURT: And you still wish to go forward today without a, a lawyer, is that correct?

MR. WADDELL: Yes, sir.

THE COURT: Intimidation, the charge to which you would be pleading guilty, is a class "A" misdemeanor. The possible penalties are zero to one year in jail and a fine from zero to one, or $5,000. Do you understand those possible penalties?

MR. WADDELL: Yes, sir.

THE COURT: You are now on parole, is that correct?

MR. WADDELL: Yes.

THE COURT: And do you understand again as I explained to Mr. Calbeck that the simple act of pleading guilty today is a full admission that you are in violation of your parole. Do you understand that?

MR. WADDELL: Yes, sir.

THE COURT: And that with nothing else the, your parole officer and the parole division could order you to serve the balance of, of any parole that you have backed up. Do you know how much time you have as backup there?

MR. WADDELL: About five or six months.

THE COURT: Okay. So, do you understand that they could just come in and say, 'Well, hey, you pled guilty. You're gonna do the rest of

that.' And that that would be consecutive to any sentence that I give you. Do you understand that?

MR. WADDELL: Yeah.

Tr. p. 17-19.

As set forth above, the trial court inquired into Waddell's understanding of the charges against him and the potential penalties that could be imposed. In addition, the trial court explained that because Waddell was pleading guilty, he may be required to serve the remainder of a previous sentence consecutively to any sentence that the trial court imposed. Furthermore, the trial court specifically asked Waddell if he understood that he was waiving certain constitutional rights, including his right to counsel. Nevertheless, Waddell insisted that he wanted to plead guilty. In light of the circumstances, we cannot say that Waddell's guilty plea was not knowingly and intelligently made.

IV. Sufficiency of the Evidence

Waddell argues that even though he admitted to making the statement, "You're my victim. If I go, you go," tr. p. 24, the statement is too vague to actually constitute a threat, which is an element of intimidation. In addition, Waddell argues that the evidence is unclear as to what conduct Waddell intended for Leasa to engage in against her will, which is also an element of intimidation.

When reviewing a claim of insufficient evidence, we neither reweigh the evidence nor judge the credibility of witnesses, but will only consider the evidence and reasonable inferences favorable to the verdict. Earlywine v. State, 847 N.E.2d 1011, 1014 (Ind. Ct. App.

2006). To convict Waddell of intimidation, there had to be sufficient evidence that he communicated a threat to another person, with the intent that the other person engage in conduct against the other person's will. I.C. § 35-45-2-1(a)(1). The statute defines "threat" as an "expression, by words or action, of an intention to . . . unlawfully injure the person threatened or another person, or damage property." Id. at -1(c)(1).

Here, Waddell twice admitted to making the statement, "You're my victim. If I go, you go." Tr. p. 20, 24. It may be reasonably inferred from the statement that Waddell intended for Lee to go with him against her will. In addition, by using the word "victim," Waddell expressed an intention to unlawfully injure Lee in some way, thus constituting a threat. In light of these circumstances, we cannot say that there was insufficient evidence to convict Waddell of intimidation.

The judgment of the trial court is affirmed.

NAJAM, J., and KIRSCH, J., concur.